FILE COPY.

Office Supreme Court U. S.
FILED
MAR 7 1904
JAMES H. MCKENNEY,
Clerk.

# In the Supreme Court of the United States

OCTOBER TERM, 1903.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,
*v.*
DAVID G. BAIRD ET AL., APPELLEES.

No. 409

## BRIEF FOR APPELLANT ON MOTION TO DISMISS THE APPEAL AND ON THE MERITS.

J. G. CARLISLE,
*Special Attorney for the Interstate Commerce Commission.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,
*v.*
DAVID G. BAIRD ET AL., APPELLEES. } No. 409.

## BRIEF FOR APPELLANT ON MOTION TO DISMISS THE APPEAL AND ON THE MERITS.

### ON THE MOTION TO DISMISS.

The question whether an appeal can be prosecuted from the order or decree of the circuit court direct to this court under the fifth section of the circuit court of appeals act is so fully discussed in the brief filed by the Assistant to the Attorney-General that it is unnecessary to present further argument or citation of authorities upon that subject. If the order or decree of the court below had been adverse to the appellees and they had been required to produce the books and papers and give the testimony called for, it seems quite clear that they could have brought an appeal direct to this court on the

ground that the case involved "the construction and application of the Constitution of the United States;" and if this is so, it is difficult to understand why the other party may not pursue the same course.

Whether the case does or does not involve "the construction or application of the Constitution" does not depend upon the question whether the court decided in favor of one party or in favor of the other. If the constitutional question is presented in the case by proper pleadings, or in any other proper form, the fifth section of the act referred to must apply whether the court below decided that question or not. The latter case is here now in this court just as it was presented in the circuit court, and the constitutional question is therefore as much involved here as it was there.

We insist that it was the intention of Congress in adopting the act of February 19, 1903, to provide that all cases prosecuted in the name of the Interstate Commerce Commission under the direction of the Attorney-General where the trial is to be had before the judges without a jury might be expedited in the court of original jurisdiction and brought directly to this court on appeal.

Suits by the Interstate Commerce Commission, whether they are at law or in equity, are not prosecuted in the name of the United States, and therefore, while the act of February 11, 1903, specifically referred to suits brought to enforce the act,

yet it could have no practical application to them; and in order to remedy this defect the act of February 19, 1903, was passed.

The provision in the latter act, upon which we rely, is as follows:

> That the provisions of an act entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.

It will be observed that suits in equity are not mentioned in the act except for the purpose of referring to and identifying the prior statute. The enactive and effective part of the statute, so far as it relates to this question, is that the provisions of the prior act "shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission." If it had been the intention of Congress to change only that part of the prior statute which confined its operation to those cases which were prosecuted

in the name of the United States, the words "to any case" were not only unnecessary, but inappropriate. If the statute had declared that the provisions of the former act should apply to "suits in equity prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission," the intention of Congress to adhere to the limitation as to the character of the suits prescribed by the former act would have been clearly expressed.

Why should the phraseology be changed if there was no purpose to extend the scope and effect of the statute? Unless there is something in the act to show clearly that a different meaning was intended to be given to the words "any case" they must be held to be equivalent to "all cases;" and inasmuch as the policy of the legislature was to facilitate the enforcement of two important laws directly affecting the public interests, this construction of the words seems to be unavoidable.

According to the construction contended for by the appellees, no action brought by the Interstate Commerce Commission for the enforcement of the provisions of the act to regulate commerce could be expedited unless it is a suit in equity, which, if correct, might exclude a great number of the most important proceedings instituted by the Commission for the purpose of enabling it to discharge its duties under the provisions of the statute.

The necessity for expedition in such a case as the present is greater than in almost any other that could be instituted under the law. The Commission, while engaged in the discharge of the duties imposed upon it, has been confronted by contumacious witnesses, who have refused to answer questions or to produce books and papers which, in the opinion of the Commission, are relevant to the questions pending before it and necessary to enable it to reach a correct conclusion. Having no power itself to compel the witnesses to testify or to produce books or papers, it must either go on without the information it deems necessary or it must suspend its proceedings for an indefinite length of time, until its application to the court can be heard in the regular course.

All civil suits brought in the name of the United States to enforce the act to protect trade and commerce are suits in equity, and therefore the act of February 11, 1903, made ample provision for expediting the trial of such suits and for direct appeal to this court; and it was evidently the intention of Congress to make the same provision for suits brought to enforce the Act to regulate commerce, except in those cases where a trial by jury is provided for by the statute. But, as before stated, the act, notwithstanding the evident intention of Congress, did not by its terms actually embrace the latter class of suits, because they are not prosecuted in

the name of the United States; and, moreover, there was room to doubt whether any action authorized by the Act to regulate commerce was a "suit in equity" in the sense in which those words are ordinarily used.

A suit in equity in the strict sense is an action to enforce equitable rights and afford equitable remedies, and is conducted in accordance with well-known and long-established forms. It might well be doubted, therefore, whether the summary proceedings authorized for the enforcement of the commerce act, although conducted on the equity side of the court, were such suits in equity as would be embraced by the terms of the act of February 11, 1903; and hence the subsequent statute was enacted in order to make it entirely clear that those suits were also to be expedited in the court of original jurisdiction and heard on direct appeal to this court.

In the twelfth section of the Act to regulate commerce, as amended March 2, 1889, and February 10, 1891, it is provided:

> That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission

to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney-General of the United States, all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books,

papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

It will be observed that the act does not state whether the application for the order requiring the witnesses to testify or produce books and papers shall be by motion or petition or by a bill or affidavit. It is clear, however, that it is a proceeding in which the court is to make an "order" or decree, and that a disobedience of this order or decree of the court may be punished as a contempt in the same manner as a refusal to obey any other order or decree of a court of equity. There is no judgment for money or property, but a mere adjudication that the respondent is subject to a certain obligation or duty and an order directing him to perform it. It is not a proceeding for contempt, for no contempt has been committed until after the order or decree of the court has been made, and then the contempt consists in a refusal to obey the

order or decree of the court, and not in a refusal to obey the order or requirement originally made by the Commission.

It is a proceeding of the same nature as that provided for in the sixteenth section of the Act to regulate commerce and in the third section of the amending act of February 19, 1903. In the sixteenth section as amended March 2, 1889, it is provided that whenever any common carrier shall violate or refuse or neglect to obey or perform any lawful order or requirement of the Commission it shall be lawful for the Commission or any company or person interested in the order or requirement—

> to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings ap

> plicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition.

The third section of the act of February 19, 1903, provides for substantially the same method of proceeding in the cases authorized to be brought by the Commission under that act. Whether these proceedings to enforce the provisions of the act are or are not "suits in equity" in the ordinary sense of the word, it is unnecessary to inquire, for it is clear that Congress has so considered and treated them in its legislation upon the subject; and this being so, it is equally clear that even if the construction of the act of February 19, 1903, contended for by the appellee, is correct, it embraces proceedings or cases of the class to which this one belongs. If the words "shall apply to *any case* prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission" are to be construed to embrace suits in equity only, still they must be held to include all cases of the kind which Congress itself has declared to be suits in equity or to be prosecuted on the equity side of the court. Any other construction would defeat the purpose of the law and leave the Interstate Commerce Commission

subject to all the obstructions and delays which have made the passage of the act necessary.

There being no other form or manner of proceeding provided in the statutes for the enforcement of this order made by the Commissioners to give testimony or to produce books and papers, the courts approve and adopt in such cases the same procedure required by the sixteenth section of the act above quoted, and they have treated all the cases as belonging to the same class; that is, suits in equity, except those in which a trial by jury is required, and they are separately provided for in the law.

In the case of *Interstate Commerce Commission* v. *Brimson* (154 U. S., 447), the case was summarily commenced in the circuit court by the filing of a petition, and the pleadings were of the same informal character prescribed by the sixteenth section of the original act and by the third section of the act of February 19, 1903; and no different course has been pursued in any such case so far as I know.

## ON THE MERITS.

### 1. THE COAL-PURCHASE CONTRACTS.

The charges made against the railroad companies in the petition filed before the Interstate Commerce Commission, as stated in the opinion of the court below, were as follows:

> (1) That the freight rates charged by them for the transportation of anthracite coal are unreasonable and unjust.

(2) That said rates are relatively unreasonable and unjust as compared with the rates charged for transportation of bituminous coal, and with the rates for other carload freight generally.

(3) That defendants have combined to pool and divide among themselves freights and freight traffic of anthracite coal; and

(4) That they have discriminated against private operators of coal mines by charging them a higher rate of freight than charged other private operators or coal companies owned by said defendants; all in violation of the interstate commerce act. (Page 832, Rec.)

It was not contended by any of the respondents that these matters were not within the jurisdiction of the Commission. Concerning the relation existing between the railroad companies and the several coal companies in whose names the contracts in controversy were made, the evidence taken before the Commission shows the following facts which, I believe, are not disputed:

The only means of transportation between the anthracite coal fields in Pennsylvania and tide water are those provided by the respondent carriers—the Pennsylvania Railroad Company, Philadelphia and Reading Railway Company, Lehigh Valley Railroad Company, Central Railroad Company of New Jersey, Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, New York, Susquehanna and Western Rail-

road Company, and the New York, Ontario and Western Railroad Company.

All the capital stock of the Philadelphia and Reading Railway Company is owned by the Reading Company. The Reading Company also owns all the stock of the Philadelphia and Reading Coal and Iron Company, whose business is mining and selling anthracite coal. The witness, George F. Baer, is president of these three companies. The coal and iron company owes the Reading Company $79,000,000, on which only 1½ per cent interest is charged. The earnings of the coal and iron company are appropriated by the Reading Company in such manner as that company deems advisable. The Philadelphia and Reading Railway Company and the coal and iron company are controlled directly by the stockholders of the Reading Company, the capital stock of which is held by three voting trustees.

The Reading Company owns a majority of the stock of the Central Railroad Company of New Jersey, having acquired it about January, 1901. The Central Railroad Company of New Jersey owns nine-tenths of the capital stock of the Lehigh and Wilkesbarre Coal Company, whose business is mining and selling anthracite coal. The witness, George F. Baer, is president of the Central Railroad Company of New Jersey and of the Lehigh and Wilkesbarre Coal Company, thus being the president of five different companies. By virtue

of its ownership of the stock of the Philadelphia and Reading Coal and Iron Company and of the Central Railroad Company of New Jersey, it is estimated that the Reading Company controls about 63 per cent of all the unmined anthracite coal in Pennsylvania.

The Lehigh Valley Railroad Company owns all the stock of the Lehigh Valley Coal Company which is engaged in mining and selling anthracite coal. It is estimated that the Lehigh Valley Coal Company owns 17 per cent of the area of unmined anthracite coal in Pennsylvania. The Reading Company and Lehigh Valley Railroad Company thus own or control about 80 per cent of the unmined anthracite coal in that State. The witness, Eben B. Thomas, is president of the Lehigh Valley Railroad Company and of the Lehigh Valley Coal Company, and he is also a director of the Erie Railroad Company. Prior to December, 1902, he was chairman of the board of directors of the Erie Railroad Company and an official of the Hillside Coal and Iron Company and of the Pennsylvania Coal Company. The Erie Railroad Company owns a controlling interest in the Hillside Coal and Iron Company, and owns all the stock of the Pennsylvania Coal Company, whose business is mining and selling anthracite coal. Its stock is also held by three voting trustees.

The Erie Railroad Company owns a majority of the capital stock of the New York, Susquehanna

and Western Railroad Company, and the latter company owns the stock of the New York, Susquehanna and Western Coal Company, whose business is mining and selling anthracite coal.

Section 5, article 17, of the constitution of Pennsylvania prohibits common carriers from directly or indirectly prosecuting or engaging in mining for transportation, but the charter of the Delaware, Lackawanna and Western Railroad Company antedates this constitutional provision, and it therefore owns and operates anthracite coal mines directly, and not by means of a subsidiary company.

The Commission alleged in its petition to the circuit court that all the so-called purchasing contracts made in the names of the coal companies owned and controlled by the railroad companies are substantially alike, and this allegation is not denied by any witness or by the answers in the case. These contracts were the result of repeated conferences between a committee representing the private mine owners and some of the presidents and other officials of the railroad companies, who were also at the same time officials of the coal companies owned or controlled by the railroad companies. (Baer, Record, 545 et seq.)

One of the contracts was exhibited to the Commission, but not produced in evidence, and it is copied in the record on pages 15 to 17. By its terms the seller agrees to deliver on the cars f. o. b.

at the breakers "all the anthracite coal hereafter mined from any of its mines now opened and operated, or which it may hereafter open and operate, etc.," but the shipments are to be "made from time to time as called for by the buyer." The seller is to receive for all sizes above pea coal, 65 per cent of the general average free-on-board prices of such sizes received at tidewater points at or near New York between Perth Amboy and Edgewater, and it is stipulated that the free-on-board price means the price received without any deductions for commissions, demurrages, or other charges, thus requiring the railroad companies or their coal companies to pay all costs of selling out of the 35 per cent. According to the testimony a large part—about 20 per cent—of the coal obtained under these contracts was transported from the mines in Pennsylvania to tidewater at or near New York, and thus became interstate traffic and shou'd, therefore, have been subject to the published rates for transportation that were charged on other coal shipped from and to the same points.

The motives for entering into these contracts are apparent. In the first place they enabled the railroads and their coal companies to control the output of the mines and prevent competition with the products of their mines in the markets; and in the second place they enabled the railroad companies, as common carriers, to secure free from competition the transportation of all coal thus procured by their coal companies from private oper-

ators. Since the contracts were made there has been in fact no real competition between the railroad companies for the coal traffic and no competition between the coal companies themselves in the sales made at tide-water points. The price of anthracite coal at New York harbor points for the same grade at the same time has been identical in all the monthly price circulars issued by the companies. Mr. Baer fixes the prices of the coal sold by the Philadelphia and Reading Coal and Iron Company and the Lehigh and Wilkesbarre Coal Company, and Mr. Truesdale fixes the prices for the Delaware, Lackawanna and Western coal. Mr. Thomas refused to state who fixes the prices for the Lehigh Valley Coal Company and the Hillside Coal and Iron Company. As already stated Baer is president of two of the most important railroad companies, and Thomas is president of the Lehigh Valley Railroad Company. Truesdale is the president of the Delaware, Lackawanna and Western Railroad Company.

The Commission by due process and orders required the production of these contracts to be used as evidence in the investigation, but the witnesses refused and the circuit court has denied the application for an order compelling them to do so. So much of the assignment of errors in this appeal as relates to this case is as follows:

> First. The court erred in dismissing the petition of the Interstate Commerce Com-

mission for an order requiring David G. Baird, secretary of the Lehigh Valley Coal Company, to produce all contracts for the purchase of anthracite coal entered into since January 1, 1901, between that company and any producers of anthracite coal or owners or operators of anthracite mines.

Second. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring George O. Waterman, secretary of the Lehigh and Wilkesbarre Coal Company, to produce all contracts for the purchase of anthracite coal entered into since January 1, 1901, between that company and any producers of anthracite coal or owners or operators of anthracite mines.

Third. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring W. G. Brown, secretary of the Philadelphia and Reading Coal and Iron Company, to produce all contracts for the purchase of anthracite coal entered into since January 1, 1901, between that company and any producers of anthracite coal or owners or operators of anthracite mines.

Fourth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring G. A Richardson, secretary of the Hillside Coal and Iron Company, to produce all contracts for the purchase of anthracite coal entered into since January 1, 1901, between that com-

pany and any producers of anthracite coal or owners or operators of anthracite mines.

Fifth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring Fred F. Chambers, secretary of the Delaware, Lackawanna and Western Railroad Company, to produce all contracts for the purchase of anthracite coal entered into since January 1, 1901, between that company and any producers of anthracite coal or owners or operators of anthracite mines.

Sixth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring E. B. Sturges to produce a contract between the Clarence Coal Company and the Hillside Coal and Iron Company for the sale to the latter company of anthracite coal and a contract between the Pine Hill Coal Company and the Philadelphia and Reading Coal and Iron Company for the sale to the latter company of anthracite coal.

In conducting the investigation called for by the petition filed before it and in the discharge of its duty under the statute "to inquire into the management of the business of all common carriers subject to the provisions of this act and to keep itself informed as to the manner and method in which the same is conducted," we respectfully submit that, under the circumstances shown to exist in this case, the Commission had a right to require the production of these contracts in order that it

might be able to ascertain from an inspection of the contracts themselves and by the examination of witnesses what rates the carriers were in fact receiving, directly or indirectly, for the interstate transportation of this coal. The contracts constitute the foundation of such an inquiry. The business and interests of the coal companies and the railroad companies are so interwoven with each other that they can not be separated in the prosecution of an inquiry into the rates actually charged and collected for carrying this particular freight.

While the coal companies owned and controlled by the railroad companies are not, as coal companies, common carriers of interstate commerce, they are all instruments or agencies by and through which the traffic is secured for their owners, who are such common carriers. The two classes of corporations are identical in interest; the stockholders constitute the body politic created by the act of incorporation, and the officials are merely their agents, or trustees, to manage its affairs; and these corporations owning the stock of the coal companies are, therefore, for all practical purposes, the real coal companies.

If the coal companies actually pay the railroad companies the published rates for the transportation of the coal acquired under the contracts in question, when 35 per cent of the average price at tide water, less costs of sale, is not sufficient for that purpose, the coal company nominally loses to

the extent of the deficiency, but in fact the railroad company, being the sole owner of the coal company, sustains the loss and the effect upon it is precisely the same as if it had collected for transportation only the 35 per cent, less the costs of sale. If, on the other hand, the coal company in such a case actually pays to the railroad company the remainder of the 35 per cent, after deducting costs of sale, the latter company does not even go through the form of charging or collecting its published rate. It is only a matter of bookkeeping, and the substance of the transaction is the same in both cases. In neither case can the railroad company actually receive the benefit of the published rate for the transportation of the coal acquired and sold under the contracts made by its subordinate corporation, and the evidence conduces strongly to show that the railroad companies did not, for a time at least, resort to the device of charging the published rate and then losing a part of it as the owner of the coal company.

The evidence shows that prior to November, 1900, the Lehigh Valley Railroad Company made an arrangement with the witness, Meeker, a coal shipper, and other shippers of anthracite coal, by which they were given the same terms as the railroad coal companies were allowed for the transportation of purchased coal; that is to say, their rates were so adjusted that these shippers paid for transportation only the difference between the cost

of coal to the Lehigh Valley Coal Company at the breakers and the average price received for it at tide water. At that time the so-called independent coal companies, from whom the railroad companies made purchases, were allowed 60 per cent of the average price at tide water, instead of 65 per cent agreed upon under the contracts which took effect in February and March, 1901. It is also shown by the evidence that in the early part of the year 1903 the so-called independent or private operators were permitted to sell their own coal in the market, the railroad coal companies going through the form of purchasing it at the breakers for $3.25 per ton and then going through the form of reselling it to the independent private operator at tide-water points for $5 per ton, thus retaining in the hands of the coal-road companies $1.75 per ton, which was the exact amount of the published rate for carrying.

These coal-purchasing contracts would therefore conduce to show:

1. That there is undue or unreasonable preference or advantage given to the independent coal companies that transfer their coal to the railroad coal companies.

2. That competition in the traffic in that coal has been suppressed, and this has a material bearing upon the question as to the reasonableness of the published rates; for if competition is not allowed to influence the rate an opportunity is thus afforded to establish unreasonable rates, and

if the railroads are in fact carrying the so-called purchased coal for 35 per cent of the tide-water price, less the cost of selling, when that percentage is less than the published rate, the inference is justifiable that the latter rate is too high for the service.

3. That the independent or private operators who refuse to sell their output to the coal-road companies are subjected to undue and unreasonable prejudice and disadvantage in respect to the rates charged for carrying their coal.

4. That the published rates charged for carrying coal not shipped through the railroad coal companies do not bear a fair and reasonable relation to the antecedent cost of the traffic as delivered for transportation—or, in other words, to the commercial value of the freight.

Speaking of one of the purchasing coal companies, the court below said:

> It appears by the record that the capital stock of the Lehigh Valley Coal Company is all owned by the Lehigh Valley Railroad Company, and it may fairly be contended that its transactions, if not those of an agent of the railroad company, were conducted solely in its interests. The contract, or at least one of the contracts, asked for, has been produced and submitted to the court, and it does not provide, as indicated in the petition, that the "prices paid to the seller are certain percentages of the prices for which the coal is sold at tide-water ter-

minals." It is entirely a contract of purchase and does not deal at all with the subject of transportation.

It is fair to infer from this that, in the opinion of the court, the mere form of the arrangement is conclusive, and that the Interstate Commerce Commission is precluded from ascertaining what its real substance is. If these contracts were, as we claim the right to show, really made by the railroad coal companies for the purpose of providing for the transportation of the coal and fixing the percentage of the tide-water price that should be appropriated to pay the charges for transportation, the form in which the arrangement was made is, we submit, wholly immaterial. Suppose the contracts had been actually made in the names of the several railroad companies, instead of the names of the coal companies owned by them. The fact that they purported on their faces to be contracts of purchase would not have been sufficient to exclude them as evidence; and this is just what was done in the case of the Delaware, Lackawanna and Western Railroad Company, which has five different contracts for the purchase of coal, all substantially the same in their terms as the contracts entered into by the coal companies belonging to the other railroad companies.

The Commission was not bound to accept the language or forms of the contracts as conclusive of their real purpose and intent in such a case as this, but had a right not only to ascertain what their

terms were, but also to ascertain how the parties interested construed and executed them. It is claimed that these arrangements were mere devices to fix the rates for transporting the so-called purchased coal and for dividing the traffic in that coal between different and competing roads in violation of the statute. Without the production of the contracts themselves the inquiry on these points can not be intelligently conducted. The statute expressly authorizes the Commission "to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation," and in order to sustain its orders in the present case it is only necessary to show that the contracts "related" to some one or more of the alleged violations of the law charged in the petition.

The identity of the railroad companies and the coal companies owned and controlled by them in respect to all matters relating to the business of mining, transporting, and selling coal is so thoroughly established by the evidence in this case that there is no escape from the conclusion that the contracts in controversy directly and necessarily affect the rates which the carriers actually receive for the service rendered. Whether the rates appear to be increased or reduced according to the contracts and the books of account kept by the carrier, the fact remains that the percent-

age for which the freight is sold in excess of the price to be paid the operators, less the costs of selling, is the sum actually received by the carrier, either directly or into the treasury of its coal companies.

### 2. THE VOUCHERS AND ORAL TESTIMONY.

The witness, Post, although required to do so, refused to produce the original vouchers for the months of April and May, 1901, April and May, 1902, and the months of January and February, 1903, showing the transactions for the purchase and transportation of coal contracted for by the Delaware, Lackawanna and Western Railroad Company from five independent coal companies. (Rec., p. 453; 7th assignment of errors, p. 840.) The witnesses, Thomas and Truesdale, were asked various questions concerning the sale of the anthracite coal procured under contracts, by whom the prices were fixed, and whether they were fixed by agreement between the presidents of the different coal roads, etc., all of which they refused to answer. These questions are set forth in the assignment of errors on pages 840–841 of the record.

1. The Delaware, Lackawanna and Western Railroad Company procured coal directly in its own name from five independent or private operators of mines under contracts similar to those made by the coal companies owned by the other railroad companies. These were part of the contracts called

for by the Commission, but not produced as evidence. The vouchers which were ordered to be produced were relevant and material because they would show the amount per ton allowed by the railroad company to the mine owner, and as the market price of the different grades of coal at the several dates specified could be shown by the testimony of witnesses, the actual amount reserved to pay for transportation after deducting the cost of selling could be readily ascertained. Thus it would be ascertained whether the railroad company had been receiving more or less than its published rates for the transportation of that coal. If the amount remaining was less per ton than the published rates which were charged to all shippers who did not transfer their product to the carrier, it is evident that the latter class of shippers were subjected to undue or unreasonable prejudice or disadvantage, in violation of the third section of the statute.

2. The relevancy and materiality of the oral evidence asked for and refused must depend upon the decision of the questions already discussed in connection with the production of the contracts. If the interests of the railroad companies and the coal companies, in whose names the contracts were made, are, as we have insisted, identical in this transaction, the evidence asked for was material to show:

(*a*) The price at which coal was being sold at tide water, because 35 per cent of that price, less

the costs of selling, must pay for the transportation;

(*b*) To show the absence of competition in fixing the price at tide water, which is the same thing as absence of competition in fixing the rate for carrying, because the rate received for carrying is a certain percentage of that price; and

(*c*) To show that the presidents and other officials of the railroad companies are the parties who fix the price of coal, thereby fixing the compensation for carrying, although in so doing they may claim to act as officials of the railroad coal companies and not as officials of the carrier companies.

### 3. TEMPLE IRON COMPANY CONTRCTS.

Two witnesses, George F. Baer and E. C. Hebbard, were required to produce certain contracts made in February, 1899, between the Guaranty Trust Company of New York, the Temple Iron Company, the Reading Company, and five of the respondent railroad companies. Hebbard has not been cited to appear on this appeal and Baer is the only witness now proceeded against in respect to this matter.

The eighth assignment of errors is as follows:

> Eighth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring George F. Baer to produce an agreement dated February 27, 1899, between the Temple Iron Company, the Guaranty Trust Com-

pany of New York, and the Reading Company; an agreement dated February 27, 1899, between the Temple Iron Company, the Guaranty Trust Company of New York, and the Lehigh Valley Railroad Company; an agreement dated February 27, 1899, between the Temple Iron Company, the Guaranty Trust Company of New York, and the Delaware, Lackawanna and Western Railroad Company; an agreement dated February 27, 1899, between the Temple Iron Company, the Guaranty Trust Company of New York, and the Central Railroad Company of New Jersey; an agreement dated February 27, 1899, between the Temple Iron Company, the Guaranty Trust Company of New York, and the New York, Susquehanna and Western Railroad Company.

The history of these contracts is given in the testimony of Baer (Rec., pp. 435–443, 527–543). It appears that in the latter part of the year 1899 the so-called independent operators of coal mines in the Lackawanna anthracite coal region organized a railroad corporation, called the New York, Wyoming and Western, to construct and operate an independent railroad from that coal field to tide water. Practically all of the independent operators in that region whose output had not been sold under contract to the railroad coal companies subscribed to the capital stock of the new railroad company and pledged to it the output of their

the costs of selling, must pay for the transportation;

(*b*) To show the absence of competition in fixing the price at tide water, which is the same thing as absence of competition in fixing the rate for carrying, because the rate received for carrying is a certain percentage of that price; and

(*c*) To show that the presidents and other officials of the railroad companies are the parties who fix the price of coal, thereby fixing the compensation for carrying, although in so doing they may claim to act as officials of the railroad coal companies and not as officials of the carrier companies.

### 3. TEMPLE IRON COMPANY CONTRCTS.

Two witnesses, George F. Baer and E. C. Hebbard, were required to produce certain contracts made in February, 1899, between the Guaranty Trust Company of New York, the Temple Iron Company, the Reading Company, and five of the respondent railroad companies. Hebbard has not been cited to appear on this appeal and Baer is the only witness now proceeded against in respect to this matter.

The eighth assignment of errors is as follows:

> Eighth. The court erred in dismissing the petition of the Interstate Commerce Commission for an order requiring George F. Baer to produce an agreement dated February 27, 1899, between the Temple Iron Company, the Guaranty Trust Com-

pany of New York, and the Reading Company; an agreement dated February 27, 1899, between the Temple Iron Company, the Guaranty Trust Company of New York, and the Lehigh Valley Railroad Company; an agreement dated February 27, 1899, between the Temple Iron Company, the Guaranty Trust Company of New York, and the Delaware, Lackawanna and Western Railroad Company; an agreement dated February 27, 1899, between the Temple Iron Company, the Guaranty Trust Company of New York, and the Central Railroad Company of New Jersey; an agreement dated February 27, 1899, between the Temple Iron Company, the Guaranty Trust Company of New York, and the New York, Susquehanna and Western Railroad Company.

The history of these contracts is given in the testimony of Baer (Rec., pp. 435–443, 527–543). It appears that in the latter part of the year 1899 the so-called independent operators of coal mines in the Lackawanna anthracite coal region organized a railroad corporation, called the New York, Wyoming and Western, to construct and operate an independent railroad from that coal field to tide water. Practically all of the independent operators in that region whose output had not been sold under contract to the railroad coal companies subscribed to the capital stock of the new railroad company and pledged to it the output of their

mines; surveys were made, rights of way were secured, and about 7,000 tons of steel rails were purchased. This projected railroad would have created competition in the business of mining, transporting, and selling anthracite coal.

The firm of Simpson & Watkins, owners of eleven collieries, were powerful and active supporters of the projected railroad. In order to eliminate them from this enterprise and prevent the projected railroad from being built, five of the carriers—the Lehigh Valley, the Central of New York, the Delaware, Lackawanna and Western, the Erie, the New York, Susquehanna and Western—together with the Reading Company, which owns the Philadelphia and Reading Railroad Company, all together controlling about 90 per cent of the area of unmined anthracite coal, caused all the collieries of Simpson & Watkins to be purchased. In order to pay for them the six companies named, represented in the matter by George F. Baer, caused to be purchased the charter of the Temple Iron Company, a Pennsylvania corporation with a capital stock of $240,000, which was operating an iron furnace near Reading.

This company then issued several million dollars of stock and bonds, and the six companies, by agreement with one another and with the Temple Iron Company, and the Guaranty Trust Company of New York, as trustee, guaranteed 6 per cent dividends upon the Temple Iron Company stock and

the payment of the principal and interest upon its bonds in the following proportions: The Reading Company, 29.96 per cent; the Lehigh Valley Railroad Company, 22.88 per cent; the Central Railroad Company of New Jersey, 17.12 per cent; the Delaware, Lackawanna and Western Railroad Company, 19.52 per cent; the Erie Railroad Company, 5.84 per cent, and the New York, Susquehanna and Western Railroad Company, 4.68 per cent. These purchases and contracts stopped the construction of the projected railroad at once. The directory of the Temple Iron Company, since these contracts were made, includes the presidents of the railroad companies mentioned. The transportation of the output of the collieries purchased is still divided in the same proportions as it was prior to the transfer. Some of the mines are reached by several of the carriers, and it appears that some arrangement exists under which one road carries the output one month and another the next month, but the precise terms agreed upon for the division of the tonnage is not yet disclosed in the record.

These contracts, if produced in evidence, would conduce strongly to show a pooling of this freight between these different and competing roads in violation of the fifth section of the Act to regulate commerce. It is not reasonable to suppose that these railroad companies would guarantee the payment of annual dividends upon the capital stock and the payment of the bonds of the Temple Iron

Company unless there was also an agreement and understanding among them that the traffic from the mines owned by that company should be pooled or divided upon substantially the same basis, or that the division of the freight which had been previously agreed upon should remain permanently as it was. Referring to these contracts, the court below said:

> If the defendants were being prosecuted under the Sherman antitrust act for having entered into a combination, agreement, or contract in restraint of trade, the contracts in question would be relevant testimony. This, however, is not a prosecution under the antitrust act, nor is the Interstate Commerce Commission the forum before whom such a prosecution is conducted.

Of course it is not contended that the Interstate Commerce Commission can annul the contracts or punish or enjoin and restrain the parties to them as a court might do under the provisions of the antitrust act; but if it finds that in the execution of the contracts acts were being done in violation of the Act to regulate commerce, it has the right to require the carriers to cease and desist from such acts. In the fifth section of the Act it is declared that it shall be unlawful for any common carrier subject to the provisions of the Act "to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and compet-

ing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof"; and in the petition filed with the Interstate Commerce Commission it was distinctly charged that the respondents had combined to pool and divide among themselves freights and freight traffic in anthracite coal.

The contracts called for constitute a most material part of the evidence necessary to show the combination to suppress competition in traffic and to pool the freight, and, in connection with other evidence tending to show that the freight has in fact been pooled, a case would be presented clearly within the jurisdiction of the Commission. It can scarcely be contended by the appellees that the antitrust act was intended to deprive or does deprive the Interstate Commerce Commission of any of the powers conferred upon it, or relieve it from any of the duties imposed upon it by the Act under which it was created. The courts alone have the power to deal effectively with illegal agreements and combinations merely as such, but the Commission has power to deal with the acts done in pursuance of such agreements and combinations when the acts constitute violations of the statutes regulating commerce.

These contracts, and all the facts preceding and following their execution, are admissible in evidence to show the suppression of competition

among these carriers in the transportation of coal from the Lackawanna regions; and the existence or nonexistence of competition for the traffic is one of the important facts to be considered in determining the reasonableness of the rates charged by the carriers. Certainly combinations to suppress competition or a combination which has that effect, whether so intended or not, is a matter which the Commission has the right to investigate, either on its own motion or at the instance of a complainant, whenever it is conducting an inquiry concerning the reasonableness of the rates charged or an inquiry concerning the manner in which the business of interstate commerce is being carried on.

Nor can a witness, when properly required to do so, lawfully refuse to produce books or papers in his possession, upon the ground that he is not a party to the suit or proceeding. (2 Greenleaf on Ev., 14 ed., sec. 305.) If the law exempted witnesses on that ground the administration of justice would be defeated in a great number of cases.

So far as it is claimed by any of the contumacious witnesses that the disclosure of the contents of the papers called for would subject him to a criminal prosecution or furnish evidence against him in any such prosecution or in any proceeding to impose a fine, penalty, or forfeiture, the statute under which the Commission has proceeded affords a complete refutation of it.

The order or decree of the circuit court should be reversed, and the witnesses should be required to produce the papers called for and answer the questions propounded to them.

J. G. CARLISLE,
*Special Attorney for the*
*Interstate Commerce Commission.*

O

FILE COPY.

2915

Office Supreme C
FILE
FEB 15
JAMES H. McKEN

# Supreme Court of the United States.

OCTOBER TERM, 1903, No. 409.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

DAVID G. BAIRD ET AL.,
Appellees.

## Notice of Motion to Dismiss Appeal.

TO HENRY M. HOYT, SOLICITOR-GENERAL; HENRY L. BURNETT, UNITED STATES DISTRICT ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK:

You will please take notice that on the 7th day of March, 1904, at the opening of court on that day or as soon thereafter as Counsel can be heard, a motion to dismiss the appeal herein for want of Jurisdiction, a copy of which is hereto annexed, will be submitted to the Supreme Court of the United States for the decision of the Court thereon, and that annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

GEO. F. BROWNELL,
ADELBERT MOOT,
Attorneys for the Appellees G. A. Richardson and E. B. Sturges.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903. No. 409.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs

DAVID G. BAIRD ET AL,
Appellees.

**Motion to Dismiss Appeal.**

Now come the appellees G. A. Richardson and E. B. Sturges by Geo. F. Brownell and Adelbert Moot, their Attorneys, appearing in their behalf and move the Court to dismiss the appeal in the above entitled cause for want of Jurisdiction on the ground that the order or decree from which this appeal purports to have been taken direct to this court, is an order or decree of the Circuit Court of the United States for the Southern District of New York in a proceeding before said court brought on the petition of the Interstate Commerce Commission, to procure an order requiring certain witnesses—the appellees herein—to produce certain documents and to answer certain questions in a proceeding pending before said Commission, and that there is no warrant in law for a direct appeal to this court from such order or decree.

GEO. F. BROWNELL,
ADELBERT MOOT,
Attorneys for the Appellees
G. A. RICHARDSON,
E. B. STURGES.